United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING EN BANC

76-1319

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1319

UNITED STATES OF AMERICA,

Appellee,

—v.—

RICHARD T. FORD,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

PETITION OF THE UNITED STATES OF AMERICA FOR REHEARING AND SUGGESTION FOR REHEARING *EN BANC*

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Preliminary Statement

The United States of America respectfully petitions for rehearing, and suggests rehearing *en banc*, of the opinion of a panel of this Court (Mansfield, Meskill, J.J.; Moore, J., dissenting), filed February 3, 1977, reversing a judgment of conviction entered in the United States District Court for the Southern District of New York with directions that the indictment against the defendant be dismissed. *United States* v. *Richard T. Ford*, Dkt. No. 76-1319, slip op. 1681 (2d Cir., February 3, 1977).

Statement of the Case

Defendant Richard T. Ford appealed from a judgment of conviction for bank robbery in violation of Title 18, United States Code, Section 2113(a); using firearms to commit the robbery in violation of Title 18, United States Code, Section 924(c)(1); transporting a stolen automobile in interstate commerce in violation of Title 18, United States Code, Sections 2312 and 2; and con-

spiracy to commit the above offenses in violation of Title 18, United States Code, Section 371.

On November 5, 1976, a panel of this Court heard oral argument. On February 3, 1977, the panel, in a split decision, reversed the judgment of conviction and remanded to the District Court with directions to dismiss the indictment. The sole basis for the reversal * was the majority's interpretation of the Interstate Agreement on Detainers (hereinafter, "The Agreement"), Title 18, United States Code, App.

The facts relevant to the disposition of the appeal were simple and not in dispute.** In November 1971 a complaint was filed in the Southern District of New York charging Ford with bank robbery and a bench warrant was issued on the bank robbery charge. On March 21, 1974, Indictment 74 Cr. 279 was filed. It named Ford alone and charged him solely with bank robbery, in violation of Title 18, United States Code, Section 2113(a). On March 24, 1974, Ford was brought on a writ of *habeas corpus ad prosequendum* issued on Indictment 74 Cr. 279 to the Southern District of New York from Massachusetts, where he was then serving a state sentence in an unrelated offense; prior to that time, the bank robbery warrant had been lodged with the Massachusetts authorities. He arrived on April 1, 1974. On April 3, 1974, a superseding indictment was filed, S. 74 Cr. 336. This

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* In his brief on appeal, Ford's able counsel raised not a single issue concerning the propriety of the trial or, indeed, any issue concerning Ford's guilt or innocence. The only other issues raised other than that involving the Agreement concerned claimed violations of Ford's rights to a speedy trial under local rules and the Sixth Amendment of the Constitution. The majority did not reach these questions, see slip op. at 1685 and n. 4, although Judge Moore, in dissent, noted that they were without merit. Slip op. at 1703.

** While in our original brief the facts underlying Ford's conviction were set out at length, Br. 8-17, in the interest of economy of space they will not be repeated here.

indictment named one James P. Flynn * as a defendant as well as Ford, and charged them with use of a weapon in the commission of a felony, interstate transportation of a stolen car, and conspiracy, as well as bank robbery. Ford having pleaded not guilty, trial was set before the Hon. Arnold Bauman for May 28, 1974.

Thereafter occurred, however, several delays, the last two of which occasioned the reversal of Ford's conviction by this Court. Prior to the first trial date the Government requested an adjournment on the basis of a showing contained in a sealed affidavit; this adjournment was granted and trial was set for August 21. During this interval, Ford was returned to Massachusetts at his own request. Prior to the August date, however, Judge Bauman resigned from the bench. The case was reassigned to Judge Motley and a trial date was set for November 18. On November 1, 1974, the Government again moved, on the basis of a second sealed affidavit, for a 90-day adjournment, which was granted.** At the end of the 90 days, however, Judge Motley was engaged in another (and lengthy) trial, and the case was *sua sponte* postponed to June 1975. In that month, however, the Southern District of New York undertook a "crash program" to dispose of civil cases, as a result of which Judge Motley, again *sua sponte*, set a new trial date of September 2, 1975. Ford was brought to New York on the strength of a second writ of *habeas corpus ad prosequendum* issued on August 8, 1975, based upon Indictment S. 74 Cr. 336. He stood trial in September and was convicted on all counts.

The majority ruled, in sum, that Ford's conviction must be reversed because of the provision of Article IV(c)

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* Flynn had been a fugitive since the filing of indictment S. 74 Cr. 336. Slip op. 1683. He was captured on February 14, 1977.

** The majority found the delays through the end of this second 90-day adjournment to be proper in both purpose and procedure. Slip op. at 1699.

of the Agreement that "In respect of any proceeding made possible by this article, trial shall be commenced within one hundred and twenty days of the arrival of the prisoner in the receiving State. . . ." The logical course of the majority's reasoning was as follows.

First, the majority noted that under this Court's very recent decision in *United States* v. *Mauro*, 544 F.2d 588 (2d Cir. 1976), the United States had been interpreted to be a "receiving State" within the meaning of the Agreement and a writ of *habeas corpus ad prosequendum* had been interpreted to be a "detainer" and a "request" by the prosecuting authority.* The majority also noted that the warrant issued in 1971 on the strength of the complaint charging Ford with bank robbery had been placed as a detainer against Ford in Massachusetts, and concluded thus that "Whether the writ independently constitutes a detainer, therefore, is not at issue here." *Id.* Even though that issue was thus decided, however, the majority nonetheless engaged in a lengthy and scholarly appraisal of the conditions preceding the adoption of the Agreement that apparently engendered the various provisions of the Agreement. Slip op. 1687-94.

Second, the majority concluded that the provisions of Art. IV(c) were violated. The majority ruled that the adjournments up to February 1975 were proper both in purpose and procedure.** The subsequent adojurnments, however, were found to be neither "for good cause" nor granted with "the prisoner or his counsel being pres-

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* *Mauro* was decided after the filing of the Government's brief. As the majority noted, in our original brief the Government "treated . . . as open" many of the questions decided in *Mauro*. Slip op. 1685.

** In particular, while the majority felt that the public interest would not be served by revealing the nature of the Government's sealed showing, it found that showing sufficient. Furthermore, those adjournments were made with "the prisoner or his counsel being present . . . ." See Slip op. 1699.

ent." * In particular, the majority noted that the mere fact that the District Judge was busy at the time of the expiration of the last permissible adjournment was not "good cause," since she should, on the basis of the then-recently decided case of *United States* v. *Drummond*, 511 F.2d 1049, 1053 (2d Cir.), *cert. denied*, 423 U.S. 844 (1975), have *sua sponte* requested that the case be reassigned to a less-occupied judge.

Finally, on the basis of the specific provisions of Art. V(c), the majority concluded that since the Agreement had been violated, the indictment must be dismissed.**

Reasons for this Petition

The Government earnestly submits that the decision in this case, if not corrected by the original panel or by the entire Court *en banc*, will have consequences far beyond the scope of this case that are nothing short of catastrophic. In this decision, the majority has interpreted and then retroactively applied a provision of the Interstate Agreement on Detainers in a manner that is clearly inconsistent with the expectations of *all* the parties

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* In fact, the record shows that the District Court adjourned the trial from February to June 1975 at a conference attended by Ford's counsel. In March, after the civil crash program was announced, the trial date was reset for September 1975 and Ford's Boston attorney was promptly advised by telephone and letter.

** It should be noted that the Art. IV(c) argument upon which the majority reversed was only barely raised in Ford's brief, and indeed is only mentioned in a footnote. Ford's Br. at 17 n. 16.

Ford's principal claim was that his return to Massachusetts prior to trial violated Art. IV(e), barring return of a prisoner "to the original place of imprisonment" prior to trial. This contention was rejected by the majority on the nearly self-evident basis that his specific request to be allowed to return constituted a waiver of that provision. Slip op. at 1697-98.

to this entire matter.* If allowed to stand, the panel's decision portends the wholesale release of concededly or demonstrably guilty criminals on grounds wholly unrelated to their guilt or innocence or to their rights to a speedy trial under the Sixth Amendment or this Court's local rules.

Specifically, we present three separate arguments, to be discussed in more detail in the Argument section of this petition.

First, we join the petition for rehearing by the United States Attorney for the Eastern District of New York in *United States* v. *Mauro*, *supra*. At the time of the writing of this petition, the *Mauro* petition is still pending.

Second, we submit that even if the *Mauro* decision remains the law in this Circuit, it should not be retroactively applied to this case.

Finally, even if *Mauro* is retroactively applied to this case, it should, under this Court's subsequent decision in *United States* v. *Cyphers*, Dkt. No. 76-1131, slip op. 1737 (2d Cir., Feb. 8, 1977), apply only to the indictment that was pending at the time Ford was brought from Massachusetts to the Southern District of New York. Since that indictment charged him only with bank robbery, it follows that at the very least Ford's conviction on other offenses should be affirmed.

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* As we will demonstrate in more detail, *infra* at p. 14-15, the record is crystal clear that no one involved in this case treated the Federal Government's actions in bringing Ford to justice as anything other than its normal exercise of a literally centuries-old power, see *Ex parte Bollman*, 8 U.S. (4 Cranch) 75 (1807) (Marshall, C. J.); *Carbo* v. *United States*, 364 U.S. 611 (1961), to procure the presence of state prisoners through the Writs Act, totally without reference to the Agreement.

ARGUMENT

POINT I

The Decision of the Court in *United States* v. *Mauro*, 544 F.2d 588 (2d Cir. 1976), Was Incorrect.

At the time of the writing of this petition, the petition for rehearing, with suggestion for rehearing *en banc*, filed by the United States Attorney for the Eastern District of New York in *United States* v. *Mauro*, *supra*, is still pending. The Government submits that that decision, which was filed after the writing of our original brief in this case and thus was not addressed in it, is wrong.*

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* Certain comments in the opinion of Judge Mansfield in this case indicate that the panel might reach the same result irrespective of the correctness of *Mauro*, in which Judge Mansfield dissented. In particular, the majority noted that a warrant issued on the basis of the 1971 complaint was filed with the Massachusetts authorities and functioned as a detainer; thus, "[w]hether the writ independently constitutes a detainer, therefore, is not at issue here." Slip op. 1685-86. Even if that warrant were a detainer, however, that still would not obviate the issue of whether a writ constituted a "request" within the meaning of the Agreement, an issue decided adversely to the Government in *Mauro* and a necessary underpinning of both that decision and this one. In other words, the mere fact that a detainer was lodged might be sufficient to trigger the provisions of Art. III, which governs responses to "requests for final disposition" made by *prisoners*. Art. IV, however, which occasioned the reversal in this case, governs the manner in which the *prosecutor* brings the prisoner to trial. Since Art. IV(c) applies only to "any proceeding made possible by this article," reversal on the basis of Art. IV necessarily raises the question of whether the use of a writ was subsumed within the treatment of a "request" under the Agreement. Hence, if *Mauro* is incorrect (as we submit it is), this decision was also incorrectly decided.

In any event, the force of this attempted distinction of the *Mauro* dissent could only apply to the bank robbery count of the indictment, which was the only crime for which the warrant was lodged in Massachusetts. For the reasons set out in Point III, *infra*, the remaining counts must be unaffected irrespective of the vitality or the applicability of *Mauro*.

We have read the petition for rehearing filed in *Mauro*, and rather than repeating the arguments made there, we note that we join in that petition. In addition to it, however, we make the following additional comments.

First, the *Ford* opinion contains voluminous material concerning the conditions that apparently led to the adoption of the Agreement. Slip op. 1687-94. While we are awestruck at the thoroughness of this portion of Judge Mansfield's opinion, properly termed a "learned and exhaustive treatise" by the dissenting member of the panel, slip op. at 1701, it should be pointed out that virtually none of the material cited could properly be termed legislative history since it consists not of the deliberations of Congress but of independent and sometimes subsequent observations of courts and commentators.* While a small portion of the material cited in this portion of the *Ford* opinion specifically deals with problems with federal detainers, see slip op. at 1697 n. 28, those observations simply do not deal with the question of whether Congress intended the Federal Government to be governed by the Agreement even when proceeding by means of a writ of *habeas corpus ad prosequendum*. Far more convincing, we submit, is Judge Mansfield's observations in dissent in *Mauro* that Congress did not intend "to subject such writs to the limitations of the [Interstate Agreement on Detainers] Act," as evidenced, *inter alia*, by a recommended clarification by 12 of the 15 committee members passing on the Agreement specifically so stating. See 544 F.2d at 597.

Second, we wish to advance one further argument that is consistent with the position taken by the Eastern

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* This Court in *Mauro* specifically noted that "[t]he legislative history of the Agreement is not particularly enlightening . . . ." 544 F.2d at 590. Judge Bartels, writing for the District Court in the same case, similarly noted that the legislative history "is sparse at best." *United States* v. *Mauro*, 414 F. Supp. 358, 361 (E.D.N.Y. 1976). Having reviewed the material, we submit that each characterization is an understatement.

District. Subsequent to the adoption of the Agreement by the Federal Government in 1970, Congress passed the Speedy Trial Act of 1974, Title 18, United States Code, Section 3161 *et seq.* Subsection 3161(j) of that Act provides specific provisions to govern the manner in which interjurisdictional transfers of prisoners should be handled. Some of those provisions would be totally superfluous if Congress had concluded that the matter would be governed by the Agreement; further, the time provisions set out by the Speedy Trial Act are in many instances more lax than those set out in the Agreement, and in any case are subject to numerous exceptions, see Title 18, United States Code, Section 3161(h), that do not exist in the Agreement. We submit that this is additional demonstration that Congress simply could not have intended the specific provisions of the Agreement to be an unnecessary and illogical exception to the far more general and comprehensive provisions of the Speedy Trial Act.*

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*We note that the extraordinarily extensive reports on the Speedy Trial Act, which covered virtually every possible consideration and ramification of the Act and were written by the same committees that passed on the Agreement, never once mention the Agreement as having any bearing on the time periods within which federal defendants must be brought to trial. See 4 U.S. Code Cong. & Adm. News 7401, 7427-29 (1974) (discussion of Title 18, United States Code, Section 3161(j)). Indeed, the brief mention of the Agreement as illustrative of procedures dealing with *state* prosecutions, *id.* at 7427, indicates that this was not mere oversight.

POINT II

This Court's Decision in *United States* v. *Mauro* Should Not Be Applied Retroactively.

Even if this Court rejects the position taken in Point I and in the petition filed by the United States Attorney for the Eastern District of New York that *Mauro* was incorrectly decided, that decision should not be applied retroactively to a transfer that long antedated it.*

In numerous decisions concerning the possible retroactivity of prior decisions, the Supreme Court, while it has noted that the problem of classification is a unique and difficult one, *Robinson* v. *Neil*, 409 U.S. 505, 509 (1973), has evolved certain guidelines. The Supreme Court has routinely granted full retroactive effect only in two situations: where the new decision has remedied an "aspect of the criminal trial that substantially impairs its truth-finding function," *United States* v. *Peltier*, 422 U.S. 531, 535 (1975),** and where the conduct that is the subject of the indictment was found under the prior decision to be "constitutionally immune from

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* We recognize that we did not articulate this issue in our original brief, although many of the policy concerns underlying our retroactivity point were voiced there. Since that brief was written prior to the *Mauro* decision, however, we submit that it would have been unreasonable for the Government to anticipate the point. While we concede that the issue might possibly have been raised at oral argument (which occurred very shortly after the filing of the *Mauro* decision), in view of the importance of the issue and the short amount of time available, we submit that it would be unfair to take the Government with this oversight.

** See, e.g., *Ivan* v. *New York*, 407 U.S. 203, 204 (1972) (*In re Winship*, 397 U.S. 358 (1970) applied retroactively); *McConnell* v. *Rhay*, 393 U.S. 2 (1968) (giving retroactive effect to the right to counsel provided in *Mempa* v. *Rhay*, 389 U.S. 128 (1967)); *Pickelsimer* v. *Wainwright*, 375 U.S. 2 (1963) (retroactive effect of *Gideon* v. *Wainwright*, 372 U.S. 335 (1963)); see also *Morgan* v. *Sieloff*, 20 Crim. L. Rep. 2252 (7th Cir., Nov. 22, 1976).

punishment," see, e.g., *Robinson* v. *Neil*, *supra*, 409 U.S. at 509 (giving retroactive effect to *Waller* v. *Florida*, 397 U.S. 387 (1970)); *United States* v. *U.S. Coin & Currency*, 401 U.S. 715, 723-24 (1971) (*Marchetti* v. *United States*, 390 U.S. 39 (1968), and *Grosso* v. *United States*, 390 U.S. 62 (1968), applied retroactively). See also *United States* v. *Travers*, 514 F.2d 1171 (2d Cir. 1974). In other situations, the Supreme Court has adopted a three-prong test based upon 1) the purpose to be served by the new decision, 2) the extent of reliance upon the previous law by the Government, and 3) "the effect on the administration of justice of a retroactive application of the new decision." *Halliday* v. *United States*, 394 U.S. 831, 832 (1969); *Desist* v. *United States*, 394 U.S. 244, 249 (1969); *Stovall* v. *Denno*, 388 U.S. 293, 297 (1967). We submit that each of these factors clearly supports the Government's position that *Mauro* should not be applied retroactively; at the very least, any balancing procedure weighing the three considerations together irrefutably demonstrates the correctness of our position.*

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* Most of the decisions cited in support of the three-pronged approach involved the possible retroactive application of new constitutional procedural decisions, and indeed the doctrine of prospectivity received its genesis—or at least its impetus—from the Supreme Court's early decisions involving the exclusionary rule. See., e.g., *Linkletter* v. *Walker*, 381 U.S. 618, 629 (1965); *Johnson* v. *New Jersey*, 384 U.S. 719 (1966). Nonetheless, the retroactivity analysis of those cases is fully applicable to *Mauro*. First, the decision in *Mauro* was not simply an interpretation of the Agreement, in the sense that even if the Agreement were read to apply to the federal government, that would not in itself deal with the problem of the Government's power acting under a writ. The conclusion of the *Mauro* majority limiting the Government's age-old power under a writ—reasoning that "[a]ny other construction would permit the United States to evade and circumvent the Agreement," 544 F.2d at 592—was essentially a prophylactic one of precisely the sort to which the retroactivity analysis most directly applies, *Michigan* v. *Payne*, 412 U.S. 47, 53 (1973). At any rate, the applicability of this analysis to interpretation of statutes, even when the predicate decision did not "overrule" a

[Footnote continued on following page]

First, the purpose of the Agreement would not be served by vacating judgments of conviction reached in reliance on everyone's understanding that the Government was not proceeding under the Agreement, particularly since Ford *never* raised the issue in the District Court. The purposes of the Agreement, as set out in Art. I, are to avoid "uncertainties which obstruct programs of

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prior judicial determination, was made explicitly clear by this Court's unanimous, *en banc* decision in *United States* v. *Kaylor*, 491 F.2d 1133, 1138-39 (2d Cir. 1974) (*en banc*), applying its interpretation of the Youth Corrections Act prospectively only, and specifically employing the *Desist* and *Stovall* tests. Similarly, in *Bailey* v. *Holley*, 530 F.2d 169, 172-74 (7th Cir. 1976), a defendant sought to take advantage of the Circuit's earlier decision in *King* v. *United States*, 492 F.2d 1337 (7th Cir. 1974), that section 555(e) of the Administrative Procedure Act applied to the United States Board of Parole. Acknowledging that Bailey was in precisely the same situation as King, the Court nonetheless ruled that the *King* decision would be prospectively applied only. In doing so the Court specifically rejected "petitioner's contention that the *Stovall* criteria for deciding questions of retroactivity are not applicable to decisions based on statutory construction." *Id.* at 173. See also *Mower* v. *Britton*, 504 F.2d 396, 399 (10th Cir. 1974). Other circuits have ruled similarly. See, e.g., *Owens* v. *United States*, 383 F. Supp. 780, 785-87 (M.D. Pa. 1974), *aff'd*, 515 F.2d 507 (3d Cir. 1975), *cert. denied*, 423 U.S. 996 (1976) and *Jackson* v. *United States*, 510 F.2d 1335 (10th Cir. 1975) (Supreme Court's interpretation of Youth Corrections Act in *Dorszynski* v. *United States*, 418 U.S. 424 (1974), to be applied prospectively only); *Krilich* v. *United States*, 502 F.2d 680, 683 (7th Cir. 1974), *cert. denied*, 420 U.S. 992 (1975) (prior decision holding that Special Agent's Report on tax prosecution was a "statement" under the Jencks Act to be applied prospectively only). Indeed, the Supreme Court itself has afforded prospective applicability to its prior interpretation of written law. In *McCarthy* v. *United States*, 394 U.S. 459 (1969), the Court held that in the absence of strict compliance with Rule 11 of the Federal Rules of Criminal Procedure a guilty plea must be vacated. Although, as a concurring justice noted, the decision "merely interpreted Rule 11 . . . and held that the rule must be strictly applied according to its terms," *Halliday* v. *United States*, 394 U.S. 831, 834 (1969) (Harlan, J., concurring), the Court held that it would be applied prospectively only, *Halliday* v. *United States*, *supra*, 394 U.S. at 832-33, explicitly following the three-pronged test of *Desist* and *Stovall*.

prisoner treatment and rehabilitation," and to promote "the expeditious and orderly disposition" of outstanding charges and "cooperative procedures" in dealing with interjurisdictional transfer of prisoners. None of these policies, which at any rate have nothing to do with improving the "truth-finding process," *Gosa* v. *Mayden*, 413 U.S. 665, 680 (1973) (plurality opinion), would be furthered by retroactive application. Ford's "programs of prisoner treatment and rehabilitation" were in fact enhanced by his return to Massachusetts at his own request, and indeed the panel rejected his claim under Art. IV(e) of the Agreement. "Cooperative procedures" were certainly unnecessary in view of the acknowledged acquiescence of the Massachusetts authorities in the authority of a federal writ. And Ford's interest in an "expeditious and orderly" processing of his charges was more than adequately protected by his rights to a speedy trial under the Sixth Amendment and the local speedy trial rules, upon which he, the Government and the District Court all focused in gauging a proper benchmark for determining whether those rights had been violated.*

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* The Supreme Court has noted that in determining possible retroactive effect, it will look to whether "other safeguards are available" to protect the right asserted. *Johnson* v. *New Jersey*, *supra*, 384 U.S. at 728. This point serves to underscore the fact that the Government does *not* contend that there are no limitations on the time period during which Ford must be brought to trial. Clearly, all of the laws specifically designed to promote his interest in a speedy trial—that is, the Sixth Amendment and the local speedy trial rules—apply to his case, as all parties acknowledged in the District Court. We do submit, however, that it is inherently unfair to reverse a conviction because of non-compliance with *additional* requirements when at the time of trial *no one* (including the defendant) considered that they applied to the Federal Government.

Ford raised issues under the Sixth Amendment and the local speedy trial rules in his brief; we answered them in our brief. In particular, at the time of the events in question, the local trial rules were satisfied by filing of a notice of readi-

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The significance of this becomes even clearer when one considers the second prong of the retroactivity test, that is, reliance on prior law. It is simply incontestable that every party to Ford's transfer to the Southern District of New York considered that the Federal Government was validly proceeding on the strength of a writ of *habeas corpus* with none of the limitations added by the Agreement. The Federal Government did not make a "request" required by the Agreement, or follow any of the procedures required by the Agreement.* Indeed, our surprise at the contentions eventually adopted in *Mauro* has been self-evident. Ford, unlike the defendants in *Mauro*, who raised the issue *promptly* and *pretrial*, not only did not assert or even mention the Agreement at any time prior to the filing of his brief on appeal, but did not follow the procedures required by the Agree-

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ness by the Government within the applicable period, which was duly done in this case. The only provision requiring actual commencement of trial was Rule 6 of the Southern District Rules requiring commencement of trial within 60 days after mistrial. While that Rule was the focus of *United States* v. *Drummond*, *supra*, upon which the majority relied, it had no application here. Thus, if the majority is incorrect in retroactively applying *Mauro* to Ford, it follows that Ford's conviction should not be reversed. At any rate, even if we are incorrect on these other issues, a reversal based *on those grounds*, where the Government concededly was on notice of their applicability, will not have the disastrous precedential effect of retroactive application of the Agreement.

* For example, the parties to the Agreement have developed common forms that are required for the processing of claims under the Agreement. These standardized documents, consecutively numbered Form I through Form IX, cover all aspects of the procedures under the Agreement, from "Notice of Untried Indictment" to be sent to a prisoner (Form I) through "Prosecutor's Report on Disposition of Charges" (Form IX). During the course of Ford's proceedings, no one ever used such a form. While we do not contend that the use of such forms is a prerequisite to assertion of rights under the Agreement, but see Art. VII, their non-use, we submit, is powerful evidence that no one at that time considered that the Agreement applied.

ment.* In short, he simply reaped a "windfall benefit," *Michigan* v. *Payne*, 412 U.S. 47, 53 (1973), from a retroactive application of *Mauro*. Finally, the state of Massachusetts, even if one were to assume that it had an interest in the disposition of Ford's appeal, clearly did not consider the Federal Government limited by the Agreement, since it never once required compliance with the procedures of the Agreement.** In short, *all* parties to this matter treated the manner in which Ford was brought to the Southern District as nothing more nor less than the Federal Government's exercise of its power under Title 28, United States Code, Section 2241(c)(5). Furthermore, we submit that this reliance was entirely justified. The *Mauro* court noted that its decision that the Agreement applied to the Federal Government was "one of first impression in this Court." 544 F.2d at 589. Indeed, while the majority in *Mauro* concluded that a writ constituted a "request" under the Agreement, its principal basis for doing so—the assertion that "[a]ny other construction would permit the United States to evade and circumvent the Agreement by simply utilizing the traditional writ," 544 F.2d at 592 (footnote omitted)—ignores the fact that the defendant under Art. III(a) can *himself* trigger the applicability of the Agreement. In any event, even if the *Mauro* majority's fear of circumvention were sound, prospective application of this

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* For example, while Ford communicated his interest in trial, he did not append the certificate required by Art. III(a). This not only precluded applicability of the Article to him but clearly shows that he was not relying on the Agreement, since it is inconceivable that one of Ford's legal acuity would not have complied with the Agreement if he thought that it applied to him. In addition, Ford's total—and acknowledged—failure to raise this issue prior to trial required the Government to present, and a judge and jury to hear, a lengthy and extraordinarily complicated trial involving 36 witnesses, most of whom were civilians, the stipulated testimony of other witnesses, and scores of exhibits.

** Those procedures include both the use of the forms described on page 14, *supra*, at * and the 30-day opportunity of the Governor to review the "request" under Art. IV(a).

essentially prophylactic reasoning in *Mauro* is clearly sufficient to cure any alleged ill. Finally, the *Mauro* majority's conclusion, whatever its merits, is not one that could possibly be foreseen by anyone other than the clairvoyant, since there is simply *not one scrap* of explicit language or even a hint in either the text of the Agreement or the legislative history behind it that the power of the Federal Government acting under authority of writs was somehow limited.*

Finally, of course, "the effect on the administration of justice of a retroactive application" of *Mauro* is clearest of all. It is incontestable that since the accession of the Federal Government to the Agreement in 1970 virtually no one—and certainly no one in this Circuit—asserted any rights under that Agreement with respect to the Federal Government until 1976. Since *Mauro* and *Ford*, a third decision has reversed a conviction upon the basis of the Agreement, *United States* v. *Cyphers*, Dkt. No. 76-1131, slip op. 1737 (2d Cir., Feb. 8, 1977), even though the defendant had not raised the issue at trial.

While there are no statistics, we submit that there is a highly significant number of prisoners whose transfers

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* In addition, the *Mauro* question was undecided in other Circuits as well. In *United States ex rel. Esola* v. *Groomes*, 520 F.2d 830 (3d Cir. 1975), the Third Circuit held that the Agreement provided the exclusive means by which a *state* prosecutor could gain custody of an out-of-state prisoner. As Judge Mansfield noted in his dissenting opinion in *Mauro*, that decision is irrelevant to *Mauro* since the state, unlike the Federal Government under the Supremacy Clause, could not have forced compliance with its writ independently of the Agreement. 544 F.2d at 593. Furthermore, in *United States* v. *Ricketson*, 498 F.2d 367, 373 (7th Cir.), *cert. denied*, 419 U.S. 965 (1974), the issue decided in *Mauro* was expressly left open. Thus, even the assiduous reader of legal decisions could have no chance of forecasting the result in *Mauro*, and this is simply not an instance of a decision that served only to "clarify or extend" prior decisions, see *Gates* v. *Henderson*, Dkt. No. 76-2065, slip op. 1345, 1349 n.2 (2d Cir., Jan. 12, 1977); see also *Welcome* v. *Vincent*, Dkt. No. 76-2126, slip op. 1661, 1671 n.3 (2d Cir., Feb. 2, 1977).

antedated the *Mauro* decision who either are in the process of raising now or will raise an issue under the Agreement. If one adds to this the spectre of collateral attacks on convictions since 1970,* the number of convictions possibly endangered by retroactive application of *Mauro* is frightening.** The inequity of that situation is particularly clear when it is considered, first, that the issue causing reversal has absolutely nothing to do with the guilt or innocence of the defendants, who are thus concededly or demonstrably guilty of serious crimes; second, that all parties were proceeding in good faith and reasonable reliance on prior law; and, third, that in many cases (such as this one) the rights now asserted under the Agreement are already protected by other laws to which the parties *did* devote their attention.

In short, under the tests developed by the Supreme Court to determine the retroactive effect of a decision, *Mauro* should be applied—if at all—prospectively only.

POINT III

Even if the Decision in *United States* v. *Mauro* is Retroactively Applied to This Case, it Applies Only to One Count.

Ford was convicted of four counts. Up to the time of his fateful transfer to the Southern District of New York on the first writ of *habeas corpus ad prosequendum*

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* In an as yet unreported decision, the Hon. Charles L. Brieant has ruled that a convicted defendant may raise an issue under the Agreement for the first time on a motion pursuant to Title 28, United States Code, Section 2255, and thus vacated a conviction on this ground. *United States* v. *Heimerle*, — F. Supp. —, Dkt. No. 76 Civ. 5563 (S.D.N.Y. Dec. 15, 1976). The Government is seeking reconsideration of that decision.

** In *United States* v. *Kaylor, supra*, this entire Court noted "great concern lest our burdened federal court system be flooded with new motions to vacate sentences . . . ." 491 F.2d at 1138. That concern must surely arise here *a molto fortiori* when the concern is that the courts will be burdened with attempts by concededly guilty defendants seeking release, and not merely resentencing.

—which alone occasioned the reversal in this case—he had been charged only with one crime, that is, bank robbery in violation of Title 18, United States Code, Section 2113(a). More specifically, the complaint filed in November 1971 charged him only with bank robbery, and the warrant lodged with Massachusetts was based solely upon this complaint; further, the indictment upon which the first writ was procured, 74 Cr. 279, charged him only with bank robbery. Only after his presence in the Southern District on the basis of the writ was sought and after he actually arrived in New York was he charged with the additional crimes underlying Counts One, Two and Four. These included use of a firearm in the commission of a felony; interstate transportation of a stolen vehicle; and conspiracy.

It clearly follows from this and from this Court's decision in *United States* v. *Cyphers*, *supra*, that to the extent that the Agreement has any bearing at all, it could occasion the reversal only of Count Three, the original bank robbery count, since it was only on that charge that he was brought to New York.* This conclusion, clear as a matter of common sense, is simply compelled by the explicit terms of the Agreement. Art. III, which deals with rights that may be triggered by a "request for final disposition" by a prisoner, speaks in both subsections (a) and (d) of "indictments, informations, or complaints *on the basis of which* detainers have been lodged against the prisoner . . ." (Emphasis added). Since Art. III(d) provides that a request by a prisoner "shall operate as a request for final disposition" of indictments "on the basis of which" the detainer was lodged, this could, clearly, only apply to Count Three.** Furthermore, Art. IV(c)

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* This point was raised in our Brief at p. 28. Neither the majority nor the dissent adverted to it in any way whatsoever.

** Thus, even if the attempt by the *Ford* majority to make consistent the position in *Ford* with that of Judge Mansfield in dissent in *Mauro* were correct, see p. 7, *supra*, at n. *, the logic of that position would only apply to Count Three.

—upon which the reversal in *Ford* was explicitly based—sets time limits for "any proceeding made possible by this article." We submit, first, that Ford's trial *in toto* was not "made possible" by the article for the simple reason that the federal government had and exercised its alternative power (not available to the states) of proceeding by a writ. In any event, even if "any proceeding made possible" were read with a view to preserving the validity of the *Mauro* decision, it could only apply to the outstanding charges at the time of Ford's transfer; it simply could not in reason or logic apply to charges added *after* he was brought to the Southern District of New York,* which were in no way "made possible" by the prior transfer. This was made explicitly clear in the Court's decision in *United States* v. *Cyphers*, *supra*, decided five days after *Ford*. In that case, a second indictment was voted against the defendant Ferro after his transfer on a federal writ. While the Court found that a violation of Art. IV(e) with respect to the transfer required dismissing the indictment voted prior to the transfer, it held that "[p]rosecution under [the second indictment] did not violate the Agreement and it will not be dismissed." Slip op. 1746. That holding is controlling here.**

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* It should be noted that a second writ of habeas corpus was sought and issued on the basis of the superseding indictment in August 1974, after Ford had been returned at his own request to Massachusetts. Since that writ was issued and exercised a matter of a few weeks prior to his trial, the Government and the District Court were obviously well within the time limits set by Art. IV(c) with respect to it. Thus, the validity of Ford's conviction hinges *only* on the effect of the first writ based on the one-count bank robbery indictment.

** Since the oral argument in *Ford*, our position in this regard has been adopted in an analogous context by the Hon. Edmund L. Palmieri in an as yet unreported decision in *United States* v. *Cumberbatch*, — F. Supp. —, Dkt. No. 76 Cr. 1076 (S.D.N.Y. Dec. 16, 1976). In that case, Cumberbatch was originally indicted for bank robbery in violation of Title 18, United States Code, Section 2113. The defendant, who was theretofore in state custody, was brought to the Southern District on the basis of a

[Footnote continued on following page]

In short, even if we are incorrect in the argument in Points I and II—and we earnestly suggest that we are not—the opposing logic could only apply to the bank robbery count of which Ford was convicted. Since he received concurrent sentences on all the counts of which he was convicted, it follows that his conviction should be affirmed.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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writ, and then returned to state custody prior to his federal trial. Cumberbatch subsequently moved to dismiss the bank robbery indictment on a basis of a violation of Art. IV(e) of the Agreement as interpreted by *Mauro*, and this motion was granted. The Government then sought a superseding indictment charging Cumberbatch, *on the basis of the very same facts underlying the first indictment*, with conspiracy in violation of Title 18, United States Code, Section 371, and carrying a firearm in violation of Title 18, United States Code, Section 924(c)(2). Judge Palmieri ruled that even though the same facts were the source of each indictment, the dismissal of the first did not preclude trial on the second. We submit that this case is governed *a fortiori* by the reasoning of the District Court in *Cumberbatch* since, first, Ford, unlike Cumberbatch, never even moved under the Agreement to dismiss the bank robbery count of the indictment in the District Court; second, the facts underlying at least the stolen vehicle charge in the superseding indictment were entirely separate from the bank robbery charge; and third, the Government in *Cumberbatch* candidly acknowledged that the superseding indictment was designed to avoid the preclusive effect of the Agreement, which is certainly not the case with the superseding indictment here.

★ U. S. Government Printing Office 1977— 714-017-563